

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

JOHN LAKE,

Plaintiff,

Civ. No. 2002/075

v.

CARICEMENT, V.I., INC.,

Defendants.

ORDER GRANTING PLAINTIFF’S MOTION TO AMEND COMPLAINT

THIS MATTER is before the Court on plaintiff’s motion to amend his complaint, to add Devcon International Corp. [“Devcon”] as a defendant. Defendant filed an opposition to which plaintiff replied. Defendant opposes the proposed amendment on the ground that plaintiff’s EEOC charge did not name Devcon as a party within the 90 day statutory filing period; that the amendment is futile in that Devcon was not plaintiff’s employer and cannot be held liable for unlawful discharge of an individual that is not an employee; and that plaintiff’s Wrongful Discharge claim is preempted by Section 301 of the Labor Management Relations Act [“LMRDA”], 29 U.S.C. § 185.¹

DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure allows a party to amend its complaint, and the court to grant such leave “when justice so requires.” Allowing amendments which amplify existing pleadings furthers the objectives of the federal rules that cases should be determined on their merits. Wright, Miller & Kane, Federal Practice and Procedure, § 1474

¹At the time of his layoff, plaintiff was a member of the United Industrial Workers of Seafarers International Union of North America.

(2001). Generally, Rule 15 does not establish a time restriction for amending a complaint and motions to amend have been allowed at different stages of litigation. Wright, Miller & Kane, § 1488. The rationale behind the policy is that leave to amend may arise during discovery. *Id.* Although undue delay has been cited as one reason for denial of an amendment, *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Court of Appeals for the Third Circuit has stated that “untimeliness as a jurisdictional bar is particularly inapt in Title VII cases, where the courts are permitted to equitably toll filing requirements in certain circumstances. *Anjelino v. The New York Times Co.*, 200 F.3d 73, 87 (3d Cir. 2000), *citing Bowen v. City of New York*, 476 U.S. 467(1986).

Defendant argues that the amendment should not be allowed because Devcon was not named in the EEOC charge and no right to sue letter was issued as to Devcon. The plaintiff concedes that Devcon was not named but urges the Court to allow the amendment because Devcon had notice of the law suit and there is a commonality of interests between Devcon and Caricement making them, in essence, one entity. A Title VII action ordinarily may be brought only against a party previously named in an EEOC action. 42 U.S.C. 2000e-5(f)(1). However, courts recognize an exception when the unnamed party received notice and when there is a shared commonality of interest with the named party. *See, e.g., Glus v. G.C. Murphy Co.*, 629 F.2d 248, 251 (3d Cir.1980), *vacated on other grounds*, 451 U.S. 935 (1981); *Schwartz v. D/FD Operating Services, LLC*, 205 F.R.D. 166 (D.Del. 2002); 6A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1499 (1990). Defendant argues that Devcon was not the plaintiff's employer but only “managed” the employees of Caricement.

Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other. *Id.* In *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986), the Supreme Court stated that “[t]imely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party.” In determining identity of interest, a Court must determine: 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named [party] are so similar [to] the unnamed party that for purposes of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party. *Glus*, 629 F.2d at 251.

Application of the *Glus* factors indicates that there is a sufficient identity of interests to infer notice to Devcon. The management arrangement between Caricement and Devcon appears to vest a substantial degree of control of business operations to Devcon. Plaintiff’s complaint alleges that Devcon made all personnel decisions on behalf of Caricement, including the decision to terminate plaintiff. Additionally, Mr. Alan Klingensmith, who is named in plaintiff’s EEOC complaint as his supervisor, and the person responsible for his termination, is an employee of Devcon. Thus, in all likelihood, Devcon had notice of the instant complaint. *See, generally*,

Arthur v. HOVIC and HOVENSA, LLC, STX Civ. No. 2000-0034 (Finch, J., Mem.Op. dated July 5, 2001)(and cases cited therein). Additionally, defendant has not argued that it will be prejudiced by the amendment.²

Defendant also argues that the amendment is futile because it is preempted by Section 301 of the Labor Management Relations Act [LMRA] and plaintiff's employment was governed by a union contract, making his wrongful discharge claim moot. Futility "means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Burlington Coat Factory*, 114 F.3d 1410, 1434 (3d Cir. 1997). Plaintiff argues that "there is evidence that no union agreement was in place at the time of his discharge." This presents a factual dispute regarding an issue for trial. In determining futility, the Court is not required to resolve factual issues but to determine whether the plaintiff is entitled to present evidence in support of his claims. *Site Microsurgical Systems, Inc. v. Cooper Companies*, 797 F.Supp.333, 336 (D.Del. 1992). This action is in the pleading phase and all of plaintiff's allegations are taken as true. *See, e.g.,; Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3rd Cir.1990). Accordingly, the Court finds that the requested amendment comports with the policy favoring resolution of claims on their merits.

Defendant claims that "plaintiff's motion to amend is motivated by bad faith and/or is a

²"Prejudice to the nonmoving party is the touchstone for the denial of the amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993) citing *Cornell & Co., Inc., v. OSHRC*, 573 F.2d 820, 823 (3d Cir.1978). An amendment will be denied if the movant establishes that it "was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the ... amendments been timely." *Id.* Incidental prejudice is not a sufficient basis for the denial of a proposed amendment. Prejudice becomes undue when a party shows that it would be "unfairly prejudiced" or deprived of the opportunity to present facts or evidence which it would have offered. *Morton International, Inc. v. A.E. Staley Mfg. Co.*, 106 F.Supp.2d 737, 745 (D.C.N.J. 2000).

blatant attempt to harass the defendant by putting pressure on it to settle a meritless claim.”

Upon review of the pleadings, this Court finds no evidence to support a finding of bad faith on behalf of plaintiff herein. Plaintiff appears to have moved to amend promptly upon learning of Devcon's involvement.

CONCLUSION

In this case, plaintiff alleges that he was terminated on the basis of his age. The information regarding Devcon was revealed during discovery and was not apparent to plaintiff at the time he filed his EEOC charge. Moreover, defendant has not claimed undue prejudice from the amendment. Plaintiff has advanced tenable arguments that the substantive proposed amendment would withstand a motion to dismiss.

Accordingly, the issues raised by the defendant are better determined on dispositive motions addressed thereto and fully briefed by the parties. To the extent defendants dispute alleged facts or propositions of law advanced by plaintiffs, they may deny the same and conduct appropriate discovery and/or file appropriate motions.

Now therefore, it is hereby

ORDERED AS FOLLOWS:

1. that the plaintiff's motion to amend his complaint is GRANTED, and the First Amended Complaint shall be filed as of date of this Order.
2. Nothing herein shall be determinative of the disposition upon any dispositive motion addressed to such pleading.

Date: March 25, 2003

ENTER:

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JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

A T T E S T:
Wilfredo F. Morales, Clerk of Court
by: _____
Deputy Clerk

cc: Vincent Colianni, II, Esq.
Sandra Nabozny-Younger, Esq. (FAX 774-7839)